

**Wan Rusdi bin Wan Musa v Public Prosecutor**

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO  
C-05-161 OF 2009

ABDUL MALIK ISHAK, AZHAR MA'AH AND MOHTARUDIN BAKI  
JICA

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16 FEBRUARY 2012

*Criminal Law — Dangerous Drugs Act 1952 — s 39B(1)(c) — Trafficking — Trafficking of 6,907g cannabis — Appeal against conviction and sentence — Drugs kept in unlocked car parked in parking lot — Car belonging to someone else and keys not with accused — Appellant denying knowledge and possession of drugs — Whether consent of public prosecutor properly obtained — Whether exclusivity of possession for trafficking proven — Whether prosecution's failure to call car owner justified invoking presumption under s 114(g) of the Evidence Act 1950 — Conviction substituted to one of possession under s 6 of the Dangerous Drugs Act 1952*

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*Criminal Procedure — Prosecution — Consent of public prosecutor — Principal charge under s 39B(1)(a) of the Dangerous Drugs Act 1952 and the alternative charge under s 39B(1)(c) of the same — Accused convicted under s 39B(1)(c) — Consent of public prosecutor ('PP') specifying offence to be under s 39B(1)(a) — Whether trial a nullity — Prosecution conducted by DPP — Consent signed and issued by DPP — Whether PP's consent implicit*

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*Evidence — Adverse inference — Failure to call witness — Whether adverse inference could be invoked — Drug trafficking charge — Failure of prosecution to call owner of car in which drugs were found — Failure to tender statement recorded from owner under s 112 of the Criminal Procedure Code — Attempts made to trace owner insufficient and unreasonable — Gap created in prosecution's case — Accused prejudiced — Adverse inference invoked*

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SP5, a police officer, had received information from an informer about drug trafficking activity carried out by the appellant. SP3 (SP5's superior officer) directed SP5 to be an agent provocateur and to arrange a meeting with the appellant on the pretext of buying drugs. The meeting was arranged to take place on 15 July 2006 at the Genting Sempah R & R ('R&R'). At the meeting, after discussing the quantum and price of the drugs, the appellant brought SP5 to a red Perodua Kancil motor car which was parked at the parking lot. The car was not locked and the appellant opened the car's boot and took out a black plastic bag which he placed on the car's rear seat. The appellant also took out a

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A box from the boot and handed it to SP5. SP5 then gave the pre-arranged signal to the arresting party which rushed in and arrested the appellant. The packages contained 6,907g of cannabis. Two days later one Nordin was arrested and he led the police to the recovery of the car keys at the public toilet of the R & R. Initially the appellant and Nordin were charged under s 39B(1)(c) of the Dangerous Drugs Act 1952 ('DDA') read with s 34 of the Penal Code. At the close of the prosecution's case, Nordin was acquitted and discharged. In his defence, the appellant claimed that the car was used by Nordin and two others and that he did not know who owned the car. According to the appellant, on 15 July 2006, he had driven the car with Nordin as a passenger and they stopped at the R & R. The appellant locked the car and handed the car keys to Nordin and they then parted company. Later, the appellant found a man whom he did not know standing near the car. The appellant found that the left rear door of the car was ajar and the window half opened. The appellant claimed that he was later assaulted with a blunt object and he fell down and became unconscious. The appellant denied knowledge of the drugs. The appellant also denied meeting and discussing with SP5. At the end of the defence case, the appellant was convicted under s 39B(1)(c) of the DDA and sentenced to death. The appellant appealed against the conviction and sentence. It was also argued that the principal charge against the appellant was under s 39B(1)(a) of the DDA and the alternative charge was under s 39B(1)(c) of the DDA. The learned trial judge had convicted the appellant under the alternative charge. However, the consent of the public prosecutor under s 39B(3) and the requisition under s 41A(1) specified the offence to be under s 39B(1)(a) and not under s 39B(1)(c).

**Held**, allowing the appeal:

- (1) Before the High Court, the prosecution was conducted by a deputy public prosecutor and the consent too was signed and issued by a deputy public prosecutor acting pursuant to s 376(3) of the Criminal Procedure Code ('CPC'). As such, no written consent of the public prosecutor was required for convicting the appellant for an offence under s 39B(1)(c) of the DDA for the simple reason that the consent of the public prosecutor was implicit (see para 29).
- (2) Exclusivity of possession is required to sustain a conviction either for the offence of possession or trafficking under the DDA. It is the duty of the prosecution to discharge this onerous burden. It is not the duty of the defence to supplement the case for the prosecution; *Abdullah Zawawi v Public Prosecutor* [1985] 2 MLJ 16 referred (see para 32).
- (3) The failure of the prosecution to call Zahariman as the registered owner of the car invariably led to a number of inferences — one of which had to be construed in favour of the appellant. In the absence of Zahariman, the court could not rule out the possibility that the drugs were put inside the

car by Zahariman bearing in mind that the car was unlocked when the appellant opened it in the presence of SP5. Zahariman was not called by the prosecution nor was his statement recorded under s 112 of the CPC tendered as an exhibit. No explanation was advanced as to why the s 112 statement of Zahariman was not tendered. It was a material document that was not tendered and the court accordingly invoked s 114(g) of the Evidence Act 1950 ('Act'). The attempts made to trace Zahariman were insufficient and unreasonable in the circumstances. The non-calling of Zahariman as the registered owner of the car had created a gap in the prosecution's case. The appellant had been prejudiced or disadvantaged by the failure of the prosecution to call Zahariman — a material witness. The fair trial of the appellant had been compromised (see paras 33, 34, 35 & 37).

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- (4) The evidence of a negotiated sale, the presence of the appellant's DNA on two items found in the car and the finding of the appellant's fingerprints in the car merely showed possession of the drugs and not trafficking in the said drugs (see para 38).
- (5) There was no evidence to prove that the appellant was exclusively in custody and control of the car before his arrest. The car was not locked and anyone could have access to it. To compound the matter further, Zahariman's statement recorded under s 112 of the CPC was not tendered pursuant to s 32(1)(i) of the Act and such failure brought to the fore the question of who was in actual control of the car prior to the appellant's arrest. The prosecution failed to exclude the possibility that other persons may have had custody or control of the car in which the drugs were found prior to the arrest of the appellant (see para 40).
- (6) It was not safe to convict the appellant on the charge of trafficking under s 39B(1)(c) of the DDA. Accordingly, the court substituted the conviction to one of possession under s 6 of the DDA and punishable under s 39A(2) of the DDA (see para 41).

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#### [Bahasa Malaysia summary]

SP5, seorang pegawai polis, telah menerima maklumat daripada seorang pemberi maklumat mengenai aktiviti pengedaran dadah yang dijalankan oleh perayu. SP3 (pegawai atasan SP5) mengarahkan SP5 untuk menjadi ejen perangkap dan untuk mengatur satu perjumpaan dengan perayu bagi tujuan membeli dadah. Perjumpaan yang diatur berlangsung pada 15 Julai 2006 di R & R Genting Sempah ('R&R'). Pada perjumpaan tersebut, selepas membincangkan kuantum dan harga dadah, perayu membawa SP5 kepada kereta Perodua Kancil berwarna merah yang diparkir di tempat parkir. Kereta tersebut tidak dikunci dan perayu membuka tempat menyimpan barang di kereta dan mengambil satu beg plastik hitam yang diletakkannya pada bahagian tempat duduk belakang kereta. Perayu juga mengeluarkan satu kotak

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- A daripada tempat menyimpan barang kereta dan memberikannya kepada SP5. SP5 kemudian memberikan isyarat yang diatur terlebih dahulu kepada pihak penangkapan yang menyerbu dan menangkap perayu. Bungkusan-bungkusan tersebut mengandungi 6,907g ganja. Dua hari kemudian seorang lelaki bernama Nordin ditangkap dan dia membawa pihak polis membuat
- B penemuan kunci kereta di tandas awam R & R. Pada mulanya perayu dan Nordin dipertuduh di bawah s 39B(1)(c) Akta Dadah Berbahaya 1952 ('ADB') dibaca bersama dengan s 34 Kanun Keseksaan. Pada penutup kes pendakwaan, Nordin dibebaskan dan dilepaskan. Dalam pembelaan dia, perayu mendakwa
- C bahawa kereta tersebut digunakan oleh Nordin dan dua orang lain dan dia tidak mengetahui siapa yang memiliki kereta tersebut. Menurut perayu, pada 15 Julai 2006, dia memandu kereta dengan Nordin sebagai penumpang dan mereka berhenti di R & R. Perayu mengunci kereta dan memberikan kunci tersebut kepada Nordin dan mereka kemudiannya berpisah. Kemudian,
- D perayu menemui seorang lelaki yang tidak dikenalnya berdiri berdekatan kereta. Perayu mendapati bahawa pintu kiri belakang kereta terbuka dan tingkap dibuka separuh. Perayu mendakwa bahawa dia diserang dengan objek tumpul dan dia jatuh dan tidak sedarkan diri. Perayu menafikan pengetahuan mengenai dadah tersebut. Perayu juga menafikan membuat perjumpaan dan berbincang dengan SP5. Pada penutup kes pembelaan, perayu disabitkan di
- E bawah s 39B(1)(c) ADB dan dijatuhkan hukuman mati. Perayu merayu terhadap sabitan dan hukuman. Dihujahkan juga bahawa pertuduhan utama terhadap perayu di bawah s 39B(1)(a) ADB dan pertuduhan alternatif di bawah s 39B(1)(c) ADB. Hakim bicara yang bijaksana menyabitkan perayu di bawah pertuduhan alternatif. Walau bagaimanapun persetujuan pendakwaraya di
- F bawah s 39B(3) dan tuntutan di bawah s 41A(1) menyatakan kesalahan di bawah s 39B(1)(a) dan bukannya di bawah s 39B(1)(c).

**Diputuskan,** membenarkan rayuan:

- G (1) Di hadapan Mahkamah Tinggi, pendakwaan dijalankan oleh timbalan pendakwa raya dan persetujuan juga ditandatangani dan dikeluarkan oleh timbalan pendakwa raya bertugas menurut s 376(3) Kanun Acara Jenayah ('KAJ'). Oleh itu, tiada persetujuan bertulis daripada pendakwa
- H raya diperlukan untuk menyabitkan perayu untuk satu kesalahan di bawah s 39B(1)(c) ADB atas alasan ringkas bahawa persetujuan pendakwa raya adalah secara tersirat (lihat perenggan 29).
- I (2) Milikan eksklusif diperlukan untuk mengekalkan sabitan sama ada untuk kesalahan memiliki atau pengedaran di bawah ADB. Adalah tugas pihak pendakwaan untuk melaksanakan beban yang membebaskan ini. Ini bukannya tugas pembelaan untuk menambah kes untuk pendakwaan; *Abdullah Zawawi v Public Prosecutor* [1985] 2 MLJ 16 dirujuk (lihat perenggan 32).
- (3) Kegagalan pendakwaan untuk memanggil Zahariman sebagai pemilik

berdaftar kereta dengan tetap membawa kepada beberapa inferens — satu yang ditafsir berpihak kepada perayu. Dengan ketiadaan Zahariman, mahkamah tidak boleh menolak kemungkinan bahawa dadah yang diletakkan di dalam kereta oleh Zahariman dengan mengingati bahawa kereta tersebut tidak dikunci apabila perayu membukanya dengan kehadiran SP5. Zahariman tidak dipanggil oleh pendakwa dan keterangannya tidak direkodkan di bawah s 112 KAJ dan dikemukakan sebagai ekshibit. Tidak penjelasan diberikan mengenai kenapa pernyataan s 112 Zahariman tidak dikemukakan. Ia merupakan dokumen penting yang tidak dikemukakan dan dengan itu mahkamah menggunakan s 114(g) Akta Keterangan 1950 ('Akta'). Cubaan-cubaan dibuat untuk mencari Zahariman adalah tidak mencukupi dan tidak munasabah dalam keadaan-keadaan. Tidak memanggil Zahariman sebagai pemilik berdaftar kereta telah menimbulkan jurang pada kes pendakwa. Perayu diprejudiskan atau berada dalam kesulitan atas kegagalan pendakwa untuk memanggil Zahariman — seorang saksi penting. Perbicaraan adil untuk perayu telah dicurigai (lihat perenggan 33, 34, 35 & 37).

- (4) Keterangan jualan yang dibincangkan, kehadiran DNA perayu pada dua barang yang ditemui dalam kereta dan dapatan cap jari perayu pada kereta hanya membuktikan milikan dadah dan bukannya pengedaran dadah tersebut (lihat perenggan 38).
- (5) Tiada keterangan yang membuktikan bahawa perayu secara eksklusifnya mempunyai jagaan dan kawalan kereta sebelum penangkapannya. Kereta tersebut tidak dikunci dan sesiapa sahaja boleh memasukinya. Yang memburukkan lagi perkara selanjutnya, pernyataan Zahariman yang direkodkan di bawah s 112 KAJ tidak dikemukakan menurut s 32(1)(i) Akta dan kegagalan tersebut membawa kepada pertanyaan terdahulu mengenai siapa yang sebenarnya mempunyai kawalan kereta sebelum penangkapan perayu. Pendakwa gagal untuk mengecualikan kemungkinan bahawa orang lain mungkin mempunyai jagaan atau kawalan kereta di mana dadah-dadah tersebut ditemui sebelum penangkapan perayu (lihat perenggan 40).
- (6) Adalah tidak selamat untuk menyabitkan perayu atas pertuduhan pengedaran di bawah s 39B(1)(c) ADB. Dengan itu, mahkamah menggantikan sabitan kepada milikan di bawah s 6 ADB dan boleh dihukum di bawah s 39A(2) ADB (lihat perenggan 41).]

## Notes

For cases on consent of public prosecutor, see 5(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3093–3095.

For cases on failure to call witness, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 232–260.

- A For cases on s 39B(1)(c), see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 640–641.

**Cases referred to**

- Abdul Hamid v PP* [1956] 1 MLJ 231 (refd)
- B *Abdullah Zawawi v PP* [1985] 2 MLJ 16, SC (refd)  
*Garmaz s/o Pakhar & Anor v PP* [1995] 3 SLR 701, HC (refd)  
*Lyn Hong Yap v PP* [1956] 1 MLJ 226, CA (refd)  
*Mraz v The Queen* (1955) 93 CLR 493, HC (refd)  
*Munusamy v PP* [1987] 1 MLJ 492, SC (refd)
- C *Perumal v PP* [1970] 2 MLJ 265, FC (refd)  
*PP v A Rashid bin Ismail* [2001] 1 AMR 1149, HC (refd)  
*PP v Chan Peng Fatt* [2000] 1 MLJ 179; [2000] 2 AMR 1405, HC (refd)  
*PP v Datuk Hj Dzulkifli* [1982] 1 MLJ 340, HC (refd)  
*PP v Ibrahim Mahmud* [2001] MLJU 197; [2001] 3 CLJ 284, HC (refd)
- D *PP v Kalaiselvan* [2001] 2 MLJ 157; [2001] 4 AMR 3973, HC (refd)  
*PP v Lee Chwee Kiok* [1979] 1 MLJ 45; [1979] 1 LNS 96 (refd)  
*PP v Lim Boon Hock & Ors* [1985] 2 MLJ 219, HC (refd)  
*PP v Md Alim bin Samad* [1998] 1 MLJ 260, HC (refd)
- E *PP v Mohamed Halipah* [1982] 1 MLJ 155, HC (refd)  
*PP v Mohd Fahmi bin Hamzah* [2002] 6 MLJ 340, HC (refd)  
*PP v Mohd Zambri bin Mohd Zelah* [2004] MLJU 569; [2005] 2 AMR 23, HC (refd)  
*PP v Nik Ahmad Aman bin Nik Mansor* [2002] 5 MLJ 641; [2002] 2 AMR 2515, HC (refd)
- F *PP v Nordin Awang* [2000] MLJU 631; [2001] 1 AMR 855, HC (refd)  
*PP v Oie Hee Koi & Associated Appeals* [1968] 1 MLJ 148, PC (refd)  
*PP v Ong Cheng Heong* [1998] 6 MLJ 678; [1998] 4 CLJ 209, HC (refd)  
*PP v Rosyatimah bte Neza & Anor* [1989] 1 MLJ 360, HC (refd)
- G *R v Russell-Jones* [1995] 3 All ER 239, CA (refd)  
*Tai Chai Keh v PP* [1948–1949] MLJ Supp 105b (refd)  
*Tan Thong Jin v PP* [2002] 3 MLJ 695; [2002] 3 AMR 2982, CA (refd)  
*Tarmizi bin Yacob & Anor v PP and another appeal* [2011] 4 MLJ 1; [2010] 8 CLJ 501, FC (distd)
- H *Ti Chuee Hiang v PP* [1995] 2 MLJ 433, SC (refd)

**Legislation referred to**

- Courts of Judicature Act 1964 s 60(1)  
Criminal Appeal Act 1912 [AU] s 6(1)
- I Criminal Procedure Code ss 112, 179, 376(3)  
Dangerous Drugs Act 1952 ss 6, 39A(2), 39B(1)(a), (b), (c), 39B(2), 39B(3), 41A(1)  
Evidence Act 1950 ss 32(1)(i), 114(g)  
Penal Code s 34

**Appeal from:** Criminal Suit No 45–04 of 2007 (High Court, Temerloh)

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*Wan Jawahir bt Harun (Wan Jawahir & Co) for the appellant.*

*Munahyza bt Mustafa (Deputy Public Prosecutor, Attorney General's Chambers)  
for the respondent/prosecution.*

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**Abdul Malik Ishak JCA (delivering judgment of the court):**

## INTRODUCTION

[1] Initially, Wan Rusdi bin Wan Musa (the appellant herein) with Nordin bin Mohd Nor ('Nordin') were charged for trafficking cannabis weighing 6,907g on 15 July 2006 at about 8.30 pm at the Genting Sempah R & R, Bukit Tinggi in the district of Bentong, Pahang, an offence under s 39B(1)(c) of the Dangerous Drugs Act 1952 ('DDA') and punishable under s 39B(2) of the DDA read with s 34 of the Penal Code. At the close of the prosecution's case, Nordin was acquitted and discharged by the High Court. The prosecution did not appeal against the decision of the High Court in acquitting and discharging Nordin at the close of the prosecution's case.

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[2] The defence of the appellant was taken under oath and he too called a witness in support, namely, Wan Rosnaida bt Wan Musa (SD2).

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[3] At the end of the defence case, the appellant was convicted under s 39B(1)(c) of the DDA and sentenced to death under s 39B(2) of the DDA. Aggrieved, he now appeals to this court.

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## THE FACTUAL MATRIX

[4] Within a short compass, the facts may be stated as follows. Detective Sergeant Mohd Zulkifli bin Mat ('SP5'), a senior police officer attached to the Kuantan polis station, received an information from an informer about a drug trafficking activity that was carried out by a person named 'DI'. On receipt of this crucial information, SP5 informed his superior officer by the name of ASP Xavier Soosainathan (SP3) about the matter. SP3 then directed SP5 to be an agent provocateur and to arrange a meeting with 'DI' on the pretext of buying drugs.

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[5] On 14 July 2006, the informer informed SP5 that 'DI' was willing to meet SP5 on 15 July 2006 at the Genting Sempah R & R at approximately 7pm. SP5 relayed this information to SP3 and the latter called a meeting of his police personnel including SP5 and briefed them about an operation to trap and arrest 'DI' — the target.

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- A** [6] In that briefing, SP5 was directed by SP3 to meet the target through the informer. SP5 was also directed to purchase 7 kilogrammes of cannabis from the target on a one to one basis without the presence of the informer. And for this purpose, SP5 was given RM30,000 placed in a sling bag meant to purchase the cannabis. SP5 was also directed that as soon as SP5 had sight of the drugs,
- B** he was to give the following signal to; the other police personnel: to drop a cigarette box and to pick it up. Upon seeing that signal, the police personnel will act to detain the target.
- C** [7] On 15 July 2006 at approximately 7pm, the informer met SP5 at McDonald's at Genting Sempah R & R. Not long thereafter, the target arrived. After the informer had introduced the target to SP5, the informer left the scene. The coast was clear, so to speak, for SP5 to deal direct with the target. In the High Court, the target was indentified by SP5 to be the appellant.
- D** [8] SP5 then discussed with the appellant in regard to the quantum and price of the drugs. After the appellant was shown the moneys in the sling bag, the appellant then brought SP5 to a red Perodua Kancil motorcar bearing registration No WGG 9995 which was parked at the parking lot in front of the McDonald's restaurant.
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- F** [9] The Perodua Kancil motorcar was not locked and the appellant was seen by SP5 opening the front door of the said motorcar on the driver's side and pulling the lever in order to open the boot of the said motorcar. From the boot, the appellant took out one black coloured plastic bag (exh 'P18') and placed it at the rear passenger's seat. Again, the appellant took out from the boot of the said motorcar, a box bearing the word 'Greentek' (exh 'P21') and the appellant handed it to SP5. When asked by SP5 as to the contents of the box (exh 'P21'),
- G** the appellant spontaneously replied 'BARANG LA' and at the same time, the appellant took the box (exh 'P21') from SP5 and the appellant opened the top part of the said box and showed its contents to SP5. Having done that, the appellant then placed the said box together with its contents at the rear seat of the said motorcar.
- H** [10] Satisfied that there were drugs inside the box (exh 'P21'), SP5 pretended that he wanted to pay and SP5 then gave the pre-arranged signal to arrest by dropping his cigarette box and picking it up again. SP5 then took to his heels when SP3 and the police party rushed in to arrest the appellant. SP3 and the police party succeeded in arresting the appellant. SP3 examined the contents of
- I** the black coloured plastic bag (exh 'P18') and the box (exh 'P21') and found compressed dried vegetable matters suspected to be cannabis therein.

[11] All the exhibits that were seized together with the appellant were then taken to the Bentong district police headquarters. The Perodua Kancil

motorcar had to be towed to the said police station because the keys were not recovered from the appellant. At the said police station, SP3 marked all the exhibits and prepared the 'Senarai bongkar' (exh 'P15') and lodged a police report vide Bukit Tinggi Report No 490/2006 (exh 'P16'). SP3 also handed all the exhibits that have been marked together with the appellant to the investigating officer Chief Inspector Pribhakaran (SP12).

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[12] After reading the police report (exh 'P16'), SP12 proceeded, just like SP3, to mark all the exhibits also. However, SP12 did not mark the Perodua Kancil motorcar.

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[13] On 16 July 2006 at about 2.30pm, SP12 directed the police photographer Detective Corporal 131007 Rosli bin Zahari (SP2) to take seven photographs of the exhibits and these photographs were marked as exhibits ('P9A-G'). On the same day at about 4.25pm, SP12 directed SP2 to take five photographs of the Perodua Kancil motorcar (exhs ('P8A-E')).

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[14] On 17 July 2006 at about 9.45pm, Nordin was arrested and he led the police to the recovery of the keys (exh 'P14') to the Perodua Kancil motorcar at the public toilet of the Genting Sempah R & R.

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[15] In due course, the government chemist Abdul Rahim bin Shadan (SP4) analysed and confirmed that the packages contained dangerous drugs, to wit, 6,907g of cannabis within the meaning of the DDA.

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[16] The prosecution also led evidence of the presence of DNA belonging to the appellant on at least two items that were found in the Perodua Kancil motorcar. Again, the finger prints lifted from the Perodua Kancil motorcar belonged to the appellant. Even the thumb print lifted on one of the packets belonged to the appellant.

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#### THE DEFENCE

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[17] The appellant testified under oath along the following lines. One week before his arrest, he accompanied his sister ('SD2') to register at UiTM Shah Alam on her final semester term. They travelled by bus from Kelantan and upon arrival at the bus stop at Kuala Lumpur, Nordin fetched them and brought them to Nordin's house at Taman Mekar, Ampang. According to the appellant, he did not bring anything from Kelantan. He said that he stayed at Nordin's house for about a week. He said that the Perodua Kancil was used by Nordin and two others and he said that he did not know who owned the said motorcar.

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A [18] On 15 July 2006 at about 7pm, the appellant drove the Perodua Kancil motorcar with Nordin as a passenger and they stopped at Genting Sempah R & R. After the appellant locked the Perodua Kancil motorcar, he handed the car keys (exh 'P14') to Nordin and they then parted company. The appellant went to purchase cigarettes and he also went to the McDonald's restaurant to eat and  
B there he met a friend by the name of 'Mail' whom he knew for the last three years. He spoke to 'Mail' for about five minutes and 'Mail' then left him. He ate at the McDonald's restaurant for about 50 minutes. Then he walked towards the Perodua Kancil motorcar. He saw a man whom he did not know standing near the Perodua Kancil motorcar. While he was waiting for Nordin, he found  
C that the left rear door of the said motorcar was ajar and the window half opened. The appellant examined the said motorcar and found a box located on the floor board of the left rear passenger's seat. He lifted the box and placed it on the seat to enable him to gain access to the right rear door of the said motorcar and to open the same. Having opened the right rear door of the said  
D motorcar, he got out and proceeded to open the driver's side of the door and he pulled the lever in order to open the boot of the said motorcar. From the boot, he took out one black coloured plastic bag (exh 'P18') and placed it on the seat of the front left passenger's side. He then checked the spare tyre and found that  
E it was intact.

[19] The appellant testified further and he said that when he first drove the Perodua Kancil motorcar, the black coloured plastic bag (exh 'P18') and the box bearing the word 'Greentek' (exh 'P21') were not inside the said motorcar.  
F He too testified that he did not open exh 'P18' and exh 'P21' and he did not know their contents. When he was about to close the boot of the said motorcar, he was assaulted with a blunt object and he fell down and became unconscious. When he regained consciousness, he realised that he was arrested. And the police showed him the exhibits to the case only upon arrival at the police  
G station. There he was forced to sign the 'Senarai Bongkar' (exh 'P15'). He denied meeting and discussing with SP5. He said that there was another male person whom he did not know who also got out from the McDonald's restaurant as he did and proceeded towards the said motorcar. He denied showing the contents of the box (exh 'P21') to SP5.

H [20] The evidence of SD2 went along the following lines. She is the sister of the appellant. She testified that in July 2006, the appellant accompanied her by bus to go to Kuala Lumpur from Kelantan because she wanted to register for her final semester term at UiTM Shah Alam. According to her, the appellant  
I did not bring anything with him to Kuala Lumpur because he would be returning back to Kelantan. Upon arrival at the bus station in Kuala Lumpur at about 5am, Nordin fetched both of them and brought them to Nordin's house at Rawang. According to her, Nordin stayed in the house in Rawang with his friends. That morning, SD2 went to the UiTM Shah Alam campus by herself.

SD2 confirmed that she did not know what transpired after that.

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## THE ANALYSIS

[21] Questions of law were raised in the amended petition of appeal and it was argued accordingly before us. It was argued that there were two charges against the appellant. The principal charge was under s 39B(1)(a) of the DDA and punishable under s 39B(2) of the DDA read with s 34 of the Penal Code. The alternative charge was under s 39B(1)(c) of the DDA and punishable under s 39B(2) of the DDA read with s 34 of the Penal Code. Yet the learned judicial commissioner ('JC') of the High Court in his written grounds of judgment laid emphasis on the alternative charge and found a prima facie case against the appellant under the alternative charge and after hearing the appellant's defence convicted the appellant under the alternative charge and sentenced him to death. However, the consent of the public prosecutor under s 39B(3) of the DDA and the requisition under s 41A(1) of the DDA specified the offence to be under s 39B(1)(a) of the DDA read with s 34 of the Penal Code and there was no mention of the punishable section under s 39B(2) of the DDA. For case of reference, the consent under s 39B(3) of the DDA and the requisition under s 41A(1) of the DDA are hereby reproduced (see p 9 of the appeal record at *jilid 1*):

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### AKTA DADAH BERBAHAYA 1952

(AKTA 234)

### IZIN DI BAWAH SEKSYEN 39B(3)

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### REKUISISI DI BAWAH SEKSYEN 41A(1)

PADA menjalankan kuasa-kuasa yang diberi kepada Pendakwa Raya oleh seksyen 39B(3) Akta Dadah Berbahaya 1952 dan terletak hak pada saya menurut seksyen 376(3) Kanun Tatacara Jenayah, saya ASLINA BINTI JONED Timbalan Pendakwa Raya, dengan ini memberi izin bagi pendakwaan:

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- (1) WAN RUSDI BIN WAN MUSA

KP NO: 780213-03-5435; dan

- (2) NORDIN BIN MOHD NOOR

KP NO: 680130-03-5247

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lanjutan dari niat bersama memperedarkan dadah berbahaya, iaitu 6907 gram Canabis suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dibaca bersama seksyen 34 Kanun Keseksaan yang dikatakan telah dilakukan pada 15 Julai 2006, lebih kurang jam 8.30 malam di kawasan tempat letak kereta R & R, Genting Sempah, Bukit Tinggi, Bentong, Pahang.

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DAN, selanjutnya, pada menjalankan kuasa-kuasa yang diberi kepada saya di bawah seksyen 41A(1) Akta Dadah Berbahaya 1952, saya, dengan ini menghendaki supaya kes;

- (1) WAN RUSDI BIN WAN MUSA

A KP NO: 780213-03-5435; dan  
(2) NORDIN BIN MOHD NOOR  
KP NO: 680130-03-5247

B tersebut dibicarakan di Mahkamah Tinggi Malaya di Temerloh, Pahang.  
BERTARIKH pada 29 Disember 2006.

Sgd. (Illegible)  
(ASLINA BINTI JONED)

C Timbalan Pendakwa Raya.

D [22] It is a statutory requirement that the consent of the public prosecutor under s 39B(3) of the DDA is required before a prosecution under 39B(1)(a) or (b) or (c) of the DDA is instituted. Consent is said to be 'an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side' (*Abdul Hamid v Public Prosecutor* [1956] MLJ 231). The consent of the public prosecutor under s 39B(3) of the DDA and the requisition under s 41A(1) of the DDA specified the offence to be under s 39B(1)(a) of the DDA and not under s 39B(1)(c) of the DDA. Even the opening speech of the learned deputy public prosecutor pursuant to s 179 of the Criminal Procedure Code ('CPC') alluded to an offence under s 39B(1)(a) of the DDA. Can the consent under s 39B(3) of the DDA as reproduced earlier be said to have been given by way of a mature deliberation after weighing mentally the factual matrix of the case? We were invited to answer this crucial question in the negative bearing in mind that s 39B(1)(a) of the DDA makes reference to 'traffic in a dangerous drug' while s 39B(1)(c) of the DDA alludes to the phrase to 'do or offer to do an act preparatory to or for the purpose of trafficking in a dangerous drug'.

G [23] Although there is no requirement for consent under s 39B(3) of the DDA to be given in writing, the existence of a written consent is useful in answering any subsequent challenge like the present case at hand. Now, since the consent here is in writing and signed, it is prima facie evidence of the existence of the relevant consent. However, it was argued that that consent applying *Public Prosecutor v Lee Chwee Kiok* [1979] 1 MLJ 45; [1979] 1 LNS 96 made the trial a nullity (per Harun J (later SCJ)) bearing in mind that it specified an offence under s 39B(1)(a) of the DDA and not s 39B(1)(c) of the DDA of which the appellant was convicted and sentenced to death. Harun J (later SCJ) in *Public Prosecutor v Lee Chwee Kiok* had this to say:

I It will be observed that although the original and amended charges are two distinct offences, they are both created by the same section of the law viz s 39B(1) and both carry the same penalty. Both require the consent of the public prosecutor under s 39B(3). The learned deputy public prosecutor argued that the amendment was

technical and as the public prosecutor had given his consent on the original charge he was at liberty to amend the charges in the manner he did. I do not think so. It was held in *Abdul Hamid v Public Prosecutor* [1956] 1 LNS 3 that a consent to prosecute 'is an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side'. The Public Prosecutor has clearly exercised his mind in respect of the original charge when he gave his consent to prosecute some four months after the alleged offence. It was incumbent on him however to exercise the same degree of deliberation in respect of the amended charge. He has not done so.

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[24] In *Tarmizi bin Jacob & Anor v Public Prosecutor and another appeal* [2011] 4 MLJ 1; [2010] 8 CLJ 501, the Federal Court was concerned with the appellants in two appeals who were originally charged with an offence under s 39B(1)(a) of the DDA read with s 34 of the Penal Code. At the end of the trial, both were however convicted and sentenced to death on the amended charge under s 39B(1)(c) of the DDA read with s 34 of the Penal Code. The Federal Court agreed that consent to the amended charge preferred against the appellants would be superfluous as the prosecution was conducted by a deputy public prosecutor.

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[25] It was argued that the case of *Tarmizi bin Jacob* can be differentiated factually. There the trial proceeded for an offence under s 39B(1)(a) of the DDA and at the end of the trial, both the appellants were convicted and sentenced to death for an offence under s 39B(1)(c) of the DDA read with s 34 of the Penal Code. Here, there were two charges. The first under s 39B(1)(a) of the DDA and there was consent for it. The second was an alternative charge under s 39B(1)(c) of the DDA and the learned JC in his judgment alluded to the offence under s 39B(1)(c) of the DDA where there was no consent and at the end of the trial convicted the appellant under s 39B(1)(c) of the DDA read with s 34 of the Penal Code.

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[26] Before us, it was strenuously argued that there was a miscarriage of justice when the consent in the present appeal was in regard to s 39B(1)(a) of the DDA right from the start notwithstanding that there was an alternative charge under s 39B(1)(c) of the DDA.

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[27] The proviso to s 60(1) of the Courts of Judicature Act 1964 carries the expression 'miscarriage of justice'. The full text of the proviso reads as follows:

Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

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[28] And the proviso to s 60(1) of the Courts of Judicature Act 1964 is

- A similar to the proviso of s 6(1) of the New South Wales Criminal Appeal Act 1912 and, in this context, it is germane to refer to the passage of Fullagar J in *Mraz v The Queen* (1955) 93 CLR 493 at p 514 where His Lordship had this to say about the phrase ‘miscarriage of justice’:
- B It is very well established that the proviso to s 6(1) does not mean that a convicted person, on an appeal under the Act, must show that he ought not to have been convicted of anything. It ought to be read, and it has in fact always been read, in the light of the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law. It is for the Crown to make it clear that there is no real possibility that justice has miscarried.
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- [29] Since ‘every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed’, can it be argued that the appellant has lost the chance to be acquitted by the High Court when the consent under s 39B(3) of the DDA that was issued for an offence under s 39B(1)(a) of the DDA was used for an offence under s 39B(1)(c) of the DDA? By virtue of the doctrine of stare decisis, we are bound by the decision of the Federal Court in *Tarmizi Yacob* and, consequently, the answer to the question posed would be in the negative. It must be recalled that before the High Court, the prosecution was conducted by a deputy public prosecutor and the consent too was signed and issued by a deputy public prosecutor acting pursuant to s 376(3) of the CPC. As such, no written consent of the public prosecutor is required for convicting the appellant for an offence under s 39B(1)(c) of the DDA for the simple reason that the consent of the public prosecutor is implicit (*Lyn Hong Yap v Public Prosecutor* [1956] MLJ 226 (CA); *Public Prosecutor v Oie Hee Koi & Associated Appeals* [1968] 1 MLJ 148 (PC); *Perumal v Public Prosecutor* [1970] 2 MLJ 265 (FC); *Public Prosecutor v Mohamed Halipah* [1982] 1 MLJ 155 (HC); *Public Prosecutor v Datuk Hj Dzulkifli* [1982] 1 MLJ 340 (HC); *Public Prosecutor v Lim Boon Hock & Ors* [1985] 2 MLJ 219 (HC); and *Garmaz s/o Pakhar & Anor v Public Prosecutor* [1995] 3 SLR 701 (HC Singapore)).
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- [30] But the evidence adduced by the prosecution is far from satisfactory. There was no evidence as to who parked the Perodua Kancil motorcar at the place mentioned in the charge. Neither was there evidence as to who put the drugs in the said motorcar. The said motorcar was unlocked at the material time. And the keys were not found inside the said motorcar. The evidence showed that the said motorcar had to be towed to the Bentong district police
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headquarters. And it was Nordin who led the police to the recovery of the keys (exh 'P14') at the public toilet of the Genting Sempah R & R.

[31] It was argued that there was no credible evidence linking the appellant to the drugs that were found in the said motorcar. The appellant had no exclusive possession of the drugs in the said motorcar bearing in mind that the registered owner of the said motorcar was not the appellant but rather one person by the name of Zahariman bin Alias ('Zahariman'), exclusivity of possession is the hallmark to attract criminal liability for an offence of possession (*Pendakwa Raya v Chan Peng Fatt* [2000] 1 MLJ 179; [2000] 2 AMR 1405; *Public Prosecutor v Nordin Awang* [2000] MLJU 631; [2001] 1 AMR 855; *Pendakwa Raya v A Rashid bin Ismail* [2001] 2 MLJ 157; [2001] 1 AMR 1149; *Public Prosecutor v Ong Cheng Heong* [1998] 6 MLJ 678; [1998] 4 CLJ 209; *Public Prosecutor v Ibrahim Mahmud* [2001] 3 CLJ 284; *Pendakwa Raya v Nik Ahmad Aman bin Nik Mansor* [2002] 5 MLJ 641; [2002] 2 AMR 2515; *Public Prosecutor v Kalaiselvan* [2001] 2 MLJ 157; [2001] 4 AMR 3973; *Public Prosecutor v Mohd Zambri bin Mohd Zelah* [2004] MLJU 569; [2005] 2 AMR 23; *Public Prosecutor v Rosyatimah bte Neza & Anor* [1989] 1 MLJ 360; *Public Prosecutor v Md Alim bin Samad* [1998] 1 MLJ 260; and *Tan Thong Jin v Pendakwa Raya* [2002] 3 MLJ 695; [2002] 3 AMR 2982 (CA)). Here, the prosecution did not lead evidence to show that it was the appellant who drove the said motorcar to the Genting Sempah R & R on the date of the offence. But, in his defence, the appellant admitted driving the said motorcar to the Genting Sempah R & R with Nordin as a passenger and parked the said motorcar there. After having locked the said motorcar, the appellant then handed the car keys (exh 'P14') to Nordin. But the appellant disassociated himself from the drugs found in the said motorcar entirely.

[32] Exclusivity of possession is required to sustain a conviction either for the offence of possession or trafficking of the dangerous drugs under the DDA. It is the duty of the prosecution to discharge this onerous burden. It is not the duty of the defence to supplement the case for the prosecution (*Abdullah Zawawi v Public Prosecutor* [1985] 2 MLJ 16 (SC)).

[33] Now, the failure of the prosecution to call Zahariman as the registered owner of the said motorcar invariably leads to a number of inferences — one of which must be construed in favour of the appellant. Spencer Wilkinson J in *Tai Chai Keh v Public Prosecutor* [1948–1949] MLJ Supp 105b aptly said at p 108 of the report:

Where there is more than one inference which can reasonably be drawn from a set of facts in a criminal case, we are of opinion that the inference most favourable to the accused should be adopted.

A [34] In the absence of Zahariman, we cannot rule out the possibility that the drugs were put inside the said motorcar by Zahariman bearing in mind that the said motorcar was unlocked when the appellant opened it in the presence of SP5. In his testimony, SP5 confirmed that the said motorcar was unlocked (see p 89 of the appeal record at *jilid 1*):

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Sebaik sahaja sampai dekat kereta Kancil warna merah nombor pendaftaran WGG 9995, 'Di' (referring to the appellant) telah membuka pintu kanan hadapan yang tidak berkunci dan menaikkan boot bahagian belakang.

C [35] According to SP12, he met Zahariman after SP6 recorded Zahariman's statement under s 112 of the CPC (see the examination-in-chief of SP12 at p 160 of the appeal record at *jilid 1* at para 20). But Zahariman was not called by the prosecution nor was his statement recorded under s 112 of the CPC tendered as an exhibit. SP12 tried to trace Zahariman but was unsuccessful. No explanation was advanced as to why the s 112 statement of Zahariman was not tendered. It was a material document that was not tendered and we accordingly invoke s 114(g) of the Evidence Act 1950. The attempts made to trace Zahariman were insufficient and unreasonable in the circumstances. At pp 160–161 of the appeal record at *jilid 1*, SP12 testified about the attempts to trace Zahariman in this way:

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Saya ada cuba mengesan Zahariman di alamat terakhir tetapi tidak dapat dikesan. Selepas terima pengesanan dari JPJ, tiada siasatan lain dijalankan.

F [36] To say the least, it was a feeble attempt to trace Zahariman and that attracts the invocation of adverse inference under s 114(g) of the Evidence Act 1950 (*Munusamy v Public Prosecutor* [1987] 1 MLJ 492 (SC); *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433 (SC); and *Public Prosecutor v Mohd Fahmi bin Hamzah* [2002] 6 MLJ 340).

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[37] The prosecution in *Public Prosecutor v Nordin Awang* did not call or offer one Mohd Yusoff who had custody of the van in which the drugs were found and the court invoked s 114(g) of the Evidence Act 1950 and held that there was a gap in the prosecution's case. Here, the non-calling of Zahariman as the registered owner of the Perodua Kancil motorcar had created a gap in the prosecution's case. It is our judgment that the appellant has been prejudiced or disadvantaged by the failure of the prosecution to call Zahariman — a material witness. In our judgment, the fair trial of the appellant has been compromised (*R v Russell-Jones* [1995] 3 All ER 239 (CA)).

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I [38] We acknowledge that there was evidence of a negotiated sale to show knowledge of the drugs on the part of the appellant. We also acknowledge that the appellant's DNA presence was detected on at least two items found in the

said motorcar. We further acknowledge that fingerprints lifted from the said motorcar belonged to the appellant and that the appellant's thumb print was also lifted on one of the packets. But all these showed possession of the drugs and not trafficking in the said drugs as per the charge. The impediments as alluded to earlier impinged on the prosecution's case and it had prejudiced or disadvantaged the appellant beyond redemption for the non-calling of Zahariman as the prosecution's witness and the non-tendering of the s 112 statement of Zahariman as an exhibit. These impediments have the effect of casting reasonable doubt on the element of custody and control of the Perodua Kancil motorcar in which the drugs were found.

[39] It is undeniable that the prosecution has the complete discretion to call any number of witnesses subject to the requirement that it has a duty, to call all the necessary witnesses essential to the unfolding of the narrative of the prosecution's case. In our judgment, Zahariman should have been called because he is the umbilical cord to connect the drugs to the appellant and to close the gaps in the prosecution's case (*Ti Chuee Hiang v Public Prosecutor*).

[40] It is our judgment that there is no evidence to prove that the appellant was exclusively in custody and control of the Perodua Kancil motorcar before his arrest. The said motorcar was not locked and anyone could have access to it. To compound the matter further, the statement of Zahariman recorded under s 112 of the CPC was not tendered pursuant to s 32(1)(i) of the Evidence Act 1950 and such failure brings to the fore the question of who was in actual control of the said motorcar prior to the arrest of the appellant. The prosecution failed to exclude the possibility that other persons may have had custody or control of the said motorcar in which the drugs were found prior to the arrest of the appellant.

[41] For these varied reasons, it is not safe to convict the appellant on the charge of trafficking under s 39B(1)(c) of the DDA and punishable under s 39B(2) of the DDA read with s 34 of the Penal Code. Accordingly, we allowed the appellant's appeal and set aside the conviction and sentence imposed by the High Court. We substituted the conviction to one of possession under s 6 of the DDA and punishable under s 39A(2) of the DDA. Since the appellant was found to be in possession of a large quantity of cannabis weighing 6,907g, we sentenced the appellant to (20) years imprisonment from the date of arrest (15 July 2006) plus the mandatory whipping of ten strokes of the rattan.

*Appeal allowed.*

Reported by Kanesh Sundrum